

BEFORE THE SUPERINTENDENT OF PUBLIC INSTRUCTION
OF THE STATE OF MONTANA

In the matter of the Appeal of)
ANN AND KENNETH SIMONSEN) DECISION AND ORDER

This is an appeal by Ann and Kenneth Simonsen, Appellants, who are the parents of two children, from an adverse decision of the Beaverhead County Transportation Committee denying Appellants' request for transportation reimbursement. Appellants own property in Beaverhead County. Appellants' children have attended school in Sheridan, Madison County, Montana for the past three years. Ann Simonsen filed an application for transportation reimbursement for these several years contending that the Lima School District has the duty to pay the transportation costs of her children because her residence is in Beaverhead County.

The Beaverhead County Transportation Committee denied Appellant's request to renew the transportation contract. The basis for the denial was that Appellants did not reside in Beaverhead County as is required by Section 20-10-105 Montana Code Annotated (hereinafter referred to as M.C.A.)

On June 22, 1978, Appellants appealed to the County Superintendent from the denial of the contract. The Beaverhead County Superintendent denied the appeal of Appellants. On October 20, 1978, Appellants petitioned the Beaverhead County Transportation Committee for a hearing on the transportation contract. On March 5, 1979, Appellants appealed to the Superintendent of Public Instruction. On September 25, 1979, the State Superintendent issued an Order stating that the Superintendent had no jurisdiction in the matter and remanded the case before the Beaverhead County Transportation Committee for a proper findings of fact hearing pursuant to Section 20-10-132 M.C.A. (1) (b).

On December 4, 1979, the District Court of the Fifth Judicial District

for Montana issued a Writ of Mandamus ordering the County Superintendent to hold a transportation committee hearing. The Beaverhead County Transportation Committee conducted a hearing on January 10, 1980 and prepared a transcript of the proceedings. The Chairman of the Beaverhead County Transportation Committee entered findings of fact, conclusions of law and order.

The findings indicate that Appellant and her two children have resided five miles south of Sheridan, Madison County, Montana for the last three years, 1977, 1978, and 1979. Appellants' children have attended Sheridan Public Schools in Sheridan, Montana. Appellants and their children have not resided at their property in the Centennial Valley. Neither child has attended the Lima High School during this time period. Kenneth Simonsen resides in Sheridan, Montana, and is employed in the Butte mining operation. Because of the severe winters in Beaverhead County, Appellants testified that they decided to move their children to Sheridan, Montana rather than transport them from the ranch in Beaverhead County to the Lima School.

Section 20-10-121 (2) M.C.A. (1979) states:

The tendering of a contract to the parent or guardian whereby the district would pay the parent or guardian for individually transporting the pupil or pupils shall fulfill the district's obligation to furnish transportation for an eligible transportee.

An eligible transportee shall mean a public school pupil:

- (a) is not less than five years of age nor has attained his twenty-first birthday;
- (b) is a resident of the state of Montana;
- (c) regardless of district and county boundaries, resides at least three miles over the shortest practical route from the nearest operating public elementary school or public high school, whichever the case may be; and
- (d) is deemed by law to reside with his parent or guardian who maintains legal residency within the boundaries of the district furnishing the transportation regardless of where the eligible transportee actually lives when attending school.

Section 20-10-105 M.C.A. states that when the residence of an eligible

transportee is a matter of controversy and is an issue before the Board of Trustees, the County Transportation Committee, or the Superintendent of Public Instruction, residence shall be determined on the basis of Section 1-1-215 M.C.A.,

Every person has, in law, a residence. In determining the place of residence, the following rules are observed:

- (1) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose and to which he returns in seasons of repose,
- (2) There can only be one residence,
- (3) A residence cannot be lost until another is gained,
- (4) The residence of his parents or, if one of them is deceased or they do not share the same residence, the residence of the parent having legal custody or, if neither parent has legal custody, the residence of the parent with whom he customarily resides is the residence of the unmarried minor child.
- (5) The residence of an unmarried minor who has a parent living cannot be changed either by his own act or that of his guardian.
- (6) The residence can be changed only by the union of act and intent.

Section 1-1-215 M.C.A. (1979)

The Montana Supreme Court has attempted to clarify the definition of residence. In Kunesh v. City of Great Falls, 132 Mont. 285, 317 P.2d 297 (1957), the Court said residence is a place where a man makes his home.

...however, these (Section 1-1-215 M.C.A.) are guides for interpretation, they are not a definition. This is unavoidable, for as Mr. Justice Holloway observed in Carwile v. Jones, 38 Mont. 590, at page 602, 101 P. 153, at page 158, "It is as easy to understand the meaning of 'residence' as it is to understand the meaning of some of the terms used in the rules for determining the meaning of 'residence'. Every case must stand on its own facts, and a decision in any event must, of necessity, be the result of a more or less arbitrary application of the rules of law to the facts presented."

The record indicates Appellants are not residents of Beaverhead County, Montana. Appellants were not registered to vote in Beaverhead County during the time of controversy; they did not license their vehicle in

Beaverhead County; they maintained no telephone or utility bills in Beaverhead County; their "home" on their pasture land in Beaverhead County is uninhabitable; the Beaverhead County Assessor has described the buildings on the Appellants' property as being abandoned; and having a scrap material value of \$300. The ranch has no electricity or running water. Also, Appellants did not live or remain at their pasture land at Beaverhead County when not called elsewhere for labor or other special or temporary purposes, nor did they return there in seasons of repose. They lived in and returned to Sheridan, Madison County, Montana.

Appellants contend that they have maintained and "intended" to reside within Beaverhead County. Appellants must have more than intent to effect the desire of maintaining a residency in Beaverhead County. Intent does not rest with a man to determine the place of his domicile by expressing intent, which is contrary to the facts in an attempt to avoid the inevitable legal consequences of such facts. 25 Am. Jur. 2D Domicile, Section 24, pages 18-

More weight and importance will be given to a person's acts than to his declarations, and when they are inconsistent, the acts will control. It is said in this connection that actions speak louder than words, but that the words are to be heard for what they are worth.

This intention, it is true, may be inferred from circumstances, and the residence may be of such a character and accompanied by such indices of a permanent home that the law will apply to the facts a result contrary to the actual intention of the parties. Veseth v. Veseth, 141 Mont. 169, 410 P.2d 930 (1966).

Appellants present a case where there is substantial evidence of actual residence in one place, Sheridan, Montana, but contradicted by an undisclosed intention to live in or return to another. The facts clearly speak louder than the intent of Appellants. As the Montana Supreme Court said in Kunesh v. City of Great Falls 317 P. 2d 297 (1956), while the word "residence" has been involved in many controversies..it will be found that it is not the word itself that has been difficult of understanding. It has been in the construction of language expressive of the effect of residence, and

of the rights arising therefrom, and based on the fact of residence. In each such case, the word becomes a part of a concept larger than itself, such as a residence necessary to the right to vote, residence in establishing a domicile, residence necessary for citizenship, etc.

In the larger concept of residence, Appellant has failed to maintain a residence on the ranch property in a way to meet the requirements set out by Section 1-1-215 M.C.A. If Appellants' residence was determined to be in Beaverhead County under the evidence in this case, such precedent would cause havoc in all school districts in the state with similar disputes.

During oral argument, Appellants contended that a Fifth Judicial District court order entered in the case of Lima School District No. 12 and Elementary School District Of Beaverhead County, Montana v. Kenneth Simonsen and Ann Simonsen, Case Number 9285, was controlling over this administrative appeal. I disagree.

The matter of the school transportation contract between the parties in this action, including the contract which is a part of the judicial dispute, is presently before the State Superintendent of Public Instruction as provided by Section 20-3-107 M.C.A.

This Appeal was properly presented to the State Superintendent of Public Instruction and I assumed jurisdiction. "The decision of the Superintendent of Public Instruction shall be final, subject to the proper legal remedies in the state courts. Such proceedings shall be commenced no later than sixty days after the date of the decision of the Superintendent of Public Instruction." (Emphasis added) Section 20-3-107 (2) M.C.A.

If an administrative remedy is provided by statute, relief must be sought from the administrative body and the statutory remedy must be exhausted before relief can be obtained by judicial review. State ex. rel. Jones v. Gilde, 168 Mont. 130, 541 P.2d 355 (1975), State ex. rel. Sletten Const. Co. v. City of Great Falls, 163 Mont. 307, 516 P.2d 1149 (1973).

This controversy contains the same subject matter, issues, and parties as is addressed in the District Court action and is subject to administrative review prior to judicial action. Appellants had not exhausted the administrative remedies and were therefore barred from pursuing this case in a court of law until such time as a final decision had been rendered by the Superintendent of Public Instruction. I conclude, therefore, that the Order of the Fifth Judicial District of the State of Montana, in and for the County of Beaverhead, is not controlling in this Appeal. Proper judicial appeal should be made upon the final determination of the State Superintendent.

The Beaverhead County Transportation Committee's Order is affirmed.

DATED SEPTEMBER 4, 1981.